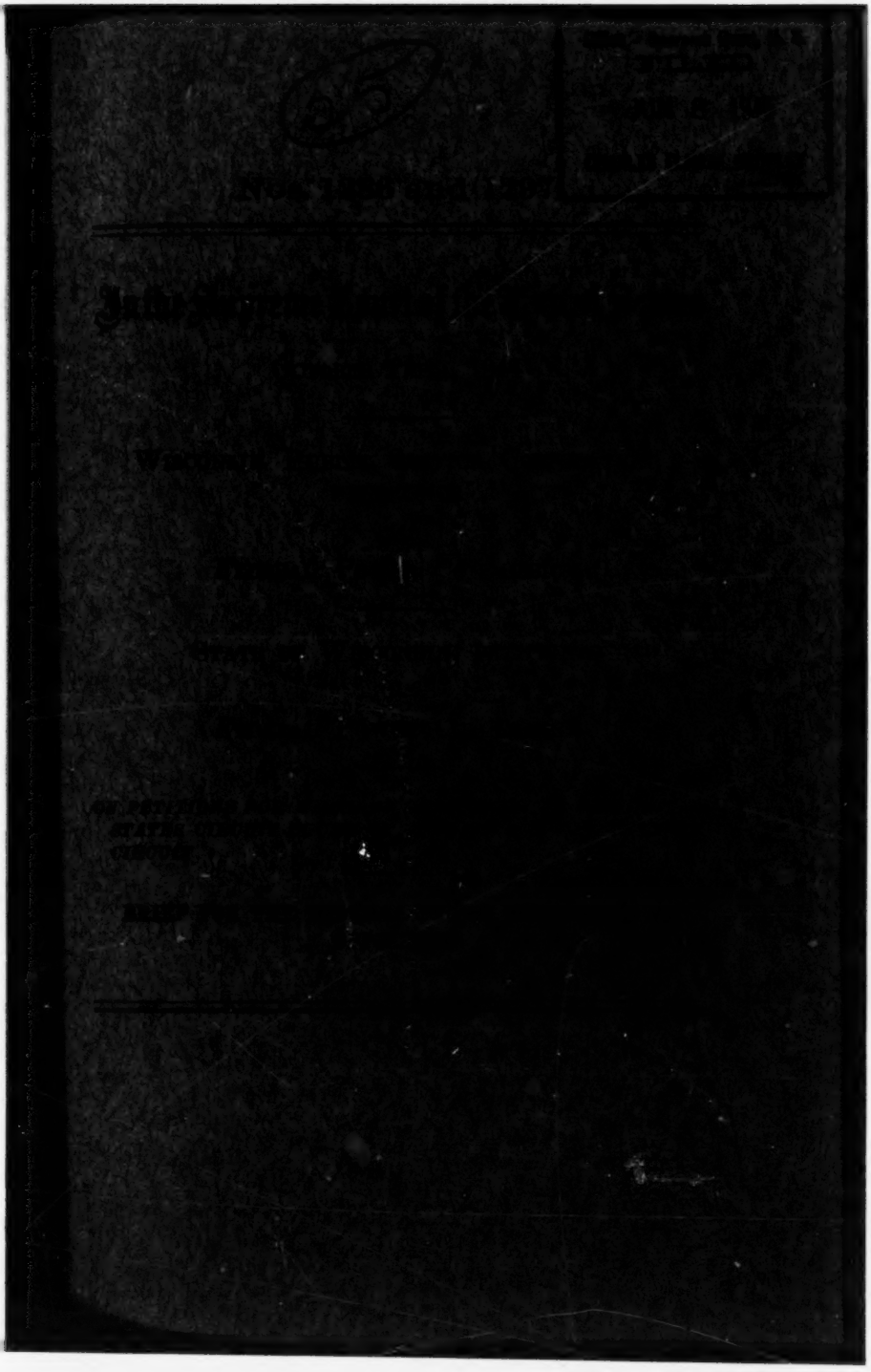

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Argument	7
Conclusion	19
Appendix	20

CITATIONS

Cases:

Allaby v. *Mauston Elec. Serv. Co.*, 135 Wisc. 345	11
Daniel Ball, The, 10 Wall. 557	13
Economy Light Co. v. *United States*, 256 U. S. 113	15
Jersey Central Power & Light Co. v. *Federal Power Commission*, 319 U. S. 61	18
National Labor Relations Board v. *Hearst Publications*, 322 U. S. 111	18
Niagara Falls Power Co. v. *Federal Power Commission*, 137 F. 2d 787, certiorari denied, 320 U. S. 792	7, 8, 9
Oklahoma v. *Atkinson Co.*, 313 U. S. 508	15
Pennsylvania Water & Power Co. v. *Federal Power Commission*, 123 F. 2d 155, certiorari denied, 315 U. S. 806	9, 10, 14, 17
State v. *Beloit City School Dist.*, 215 Wisc. 409	11
Union Bridge Co. v. *United States*, 204 U. S. 364	10
United States v. *Appalachian Power Co.*, 311 U. S. 377	7, 12, 13, 15, 17
United States v. *Bellingham Bay Boom Co.*, 176 U. S. 211	9
United States v. *Central Pacific R. R. Co.*, 118 U. S. 235	8
United States v. *Northern Pac. Ry. Co.*, 256 U. S. 51	8
United States v. *Rio Grande Irrigation Co.*, 174 U. S. 690	15

Statutes:

Act of Sept. 19, 1890, c. 690, § 10, 26 Stat. 454	9
Act of Jan. 21, 1895, c. 37, § 2, 28 Stat. 635	10
Act of May 14, 1896, c. 179, 29 Stat. 120, 43 U. S. C. 957	10
Act of Mar. 3, 1899, c. 425, §§ 9 and 10, 30 Stat. 1151, 33 U. S. C. 401, 403	10
Act of Feb. 15, 1901, c. 372, 31 Stat. 790, 16 U. S. C. 79, 43 U. S. C. 959	10

649011—45——1

Statutes—Continued. Page

Federal Power Act (June 10, 1920, c. 285, 41 Stat. 1063, amended Aug. 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C. 791a–825r):

Sec. 3 (8) 13, 20
Sec. 4 (e) 20
Sec. 4 (g) 22
Sec. 23 (a) 22
Sec. 23 (b) 2, 3, 4, 5, 11, 13, 23
Sec. 313 (a) 24
Sec. 313 (b) 7, 25
Sec. 313 (c) 26

Laws of Wisconsin, Chapter 380, 1915 (Section 31.18, Statutes of Wisconsin, 1937) 4, 27

Laws of Wisconsin, Chapter 12, Section 5, 1887 4

Miscellaneous:

House Hearings, Committee on Water Power, 65th Cong., 2d Sess., pp. 503–507 10

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1286

WISCONSIN PUBLIC SERVICE CORPORATION,
PETITIONER

v.

FEDERAL POWER COMMISSION

No. 1297

STATE OF WISCONSIN, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 644)[1] is not yet reported. The Federal Power

[1] Although a separate record was filed with each petition, the records are in the main identical, in that the court below

Commission's opinion, determination and order (R. 595, 612) are reported, 3 F. P. C. 495, 50 P. U. R. (NS) 305.

JURISDICTION

The judgments of the circuit court of appeals were entered on February 26, 1945 (R. 655). The petition of Wisconsin Public Service Corporation for a writ of certiorari was filed on May 17, 1945; that of the State of Wisconsin was filed on May 21, 1945. The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. 825*l*) and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. The first sentence of Section 23 (b) of the Federal Power Act excepts from its licensing requirements any dam constructed and maintained "under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920." The petitioner Wisconsin Public Service Corporation (hereinafter referred to as the Corporation) seeks to present the question whether the conditions of this exception are met in the case of a permit granted by state, as distinguished from federal, authority.

---

wrote but a single opinion, sustaining a single order of the Federal Power Commission, which in turn was based upon a single record of proceedings before it. For all purposes of this brief, record references apply equally to either record.

2. Both petitioners raise the question whether there was warrant in the record and a reasonable basis in law for the Federal Power Commission's determination that the Wisconsin River at Tomahawk, Wisconsin, is one of the "navigable waters of the United States," as that term is used in the first sentence of Section 23 (b) of the Federal Power Act.[2]

STATUTES INVOLVED

The relevant provisions of the Federal Power Act (June 10, 1920, c. 285, 41 Stat. 1063, amended August 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C. 791a–825r) and of Section 31.18, Wisconsin Statutes, 1937, are set forth in the Appendix, *infra*.

STATEMENT

On May 27, 1937, the Corporation filed with the Federal Power Commission (hereinafter referred to as the Commission) a Declaration of Intention

---

[2] As pointed out in the argument, *infra*, the petitions differ in some respects in the contentions which they advance on this issue.

The Corporation also seeks to raise the question whether the record is adequate to support the Federal Power Commission's additional finding, under the second sentence of Section 23 (b), that "the interests of interstate commerce would be affected by the reconstruction" of the Corporation's dam at Tomahawk (R. 611). This finding is material only if it is held that the Commission was in error in concluding that the Wisconsin River at Tomahawk was "navigable" (cf. notes 6, 7, *infra*); and since we regard petitioners' contentions on the latter issue as wholly lacking in merit we consider it unnecessary to present argument as to the effect of the dam on the interests of interstate commerce.

(R. 1), under Section 23 (b) of the Federal Power Act,[3] to "reconstruct" a dam across the Wisconsin River at Tomahawk, in Lincoln County, Wisconsin, on the site of a deteriorated (R. 17–19, 469, 484), rock-filled, timber crib dam originally completed in about 1897 under a state franchise granted in 1887 (R. 467, 598).[4] At about the same time, the Corporation applied for, and on August 26, 1937, it obtained from the Public Service Commission of Wisconsin a permit under Chapter 31, Statutes of Wisconsin, "for rebuilding and operating and maintaining the Tomahawk dam" (R. 478).[5]

---

[3] Section 23 (b) as amended in 1935 (August 26, 1935, c. 687, 49 Stat. 846, 16 U. S. C. 817) requires a Declaration of Intention to be filed with the Commission whenever a dam is intended to be constructed across a "stream or part thereof, other than those defined [in the Act] as navigable waters, and over which Congress has jurisdiction under" the commerce clause. If, upon investigation, the Commission "shall find that the interests of interstate or foreign commerce would be affected by such proposed construction," Section 23 (b) prohibits construction, operation or maintenance thereof until a license shall have been issued pursuant to the Act.

[4] On July 14, 1936, the Corporation had purchased for $8,000 (R. 475) the old timber crib dam and the franchise granted by Chapter 12, Laws of Wisconsin, 1887 (R. 540), under which the dam had been built originally (R. 17, 471–473).

[5] Section 5 of Chapter 12 of the 1887 Laws had provided that it might at any time be amended or repealed (R. 542). Chapter 380, Laws of Wisconsin, 1915 (Section 31.18, Wisconsin Statutes, 1937) provided, among other things, that no substantial alteration should be made in any dam theretofore constructed, without obtaining an order therefor from

Extended hearings here held on the Declaration of Intention filed with the Federal Power Commission, and the State of Wisconsin (hereinafter referred to as the State) and the Public Service Commission of Wisconsin were permitted to intervene in the proceedings (R. 7–8). After the hearings had been closed and briefs had been filed, the Commission, on its own motion, reopened the hearings for the purpose of taking additional evidence as to the navigability of upper portions of the river (Tr. 550–551, not printed). If the river was navigable a license would in any event be required in the absence of a permit granted prior to June 10, 1920, since the first sentence of Section 23 (b) makes it unlawful for "any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam * * * across, along, or in any of the navigable waters of the United States * * * except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to" the Act.

On July 30, 1943, the Commission entered its opinion and order (R. 595–611, 612–613) wherein, after making detailed subsidiary findings (R. 597–606), it found that because of the "regular use of the Wisconsin River over a long period of

---

the Railroad Commission (subsequently changed to the Public Service Commission) entered after investigation and upon findings duly made.

years for the transportation of large quantities of logs, lumber, rafts, and other forest products to mill and market to points within the State of Wisconsin and in other States," the river "is navigable throughout its entire length" (R. 610). The Commission concluded that the Wisconsin River is a "navigable water of the United States" within the meaning of the Act (R. 611). It further concluded that "the interests of interstate commerce would be affected by the reconstruction proposed" (R. 611, 613).[6] On the basis of these conclusions it directed the Corporation to apply for a license for "operation and maintenance" of the project (R. 613) which the Corporation had constructed while the proceedings were pending before the Commission (R. 612).

The Corporation, the State and the Public Service Commission filed applications for rehearing (R. 614, 617, 619). On September 21, 1943, the Commission denied the Corporation's application (R. 621), and dismissed the others (R. 623). The Corporation, the State and the Public Service Commission petitioned the United States Circuit Court of Appeals for the Seventh Circuit for review of the Commission's order of July

[6] A finding as to the effect of a dam on the interests of interstate commerce is required only under the second sentence of Section 23 (b), applicable to nonnavigable waters alone. In view of the Commission's principal finding that the river was navigable, its second finding was immaterial, though responsive to the Declaration of Intention by which the proceeding had been initiated.

30, 1943, under Section 313 (b) of the Act, and on February 26, 1945, that court affirmed the order (R. 655).[7]

ARGUMENT

1. We think it clear that the exception in Section 23 (b) for dams constructed "under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920" refers only to permits or rights-of-way conferred by federal, as contrasted with state, authority. The issue, of course, is one of statutory construction, not of federal jurisdiction. Cf. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 422–424. Were the prohibitions of Section 23 (b) directed only to private enterprise there might be force to the argument of the petitioner Corporation. But states and municipalities as well as private organizations fall within the ambit of the section. As was said in *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787 (C. C. A. 2), certiorari denied, 320 U. S. 792, in construing the similar language of Section 23 (a), the inclusion of states within the prohibition "precluded the state's immunity as to projects operated by itself, for the only immunity conferred is upon 'permits',

[7] As the court concluded that the Commission had properly found the river to be navigable, it had no occasion to, and did not, pass upon the propriety of the second finding, as to the effect of the dam upon the interests of interstate commerce. See note 2, *supra*.

'rights-of-way' or 'authority' which some authority has granted, and a state acts of its own authority and not by grant. Yet it would be absurd to suppose that a corporation operating under a state's license could be immune from federal control when the same 'project' would not be, if operated by the state itself" (p. 791). The exception of federal permits issued prior to the adoption of the Act in 1920 is to be explained by this Court's holdings as to the indefeasibility of a federal grant once made and acted upon (*United States* v. *Central Pacific R. R. Co.,* 118 U. S. 235, 238; *United States* v. *Northern Pac. Ry. Co.,* 256 U. S. 51, 63, 64); but no such considerations could have motivated an exception in favor of state-granted permits. As said in the *Niagara Falls* case, *supra,* again at p. 791:

> * * * it would have been a groundless compunction which should have protected "permits," "rights-of-way" or "authority" granted by municipalities or states. The purpose being to conserve all water power, so far as it was national, it would have been an anomaly to exempt anyone—states or individuals—who by an earlier unauthorized occupation had assumed to appropriate any part of this natural resource. No prescription could in law run against the nation; we must not impute to Congress any willingness to grant prescription as a favor.

While the question is doubtless important in the administration of a vital federal statute, the petitioner Corporation presents neither authority nor argument for the view that the construction adopted by the court below is subject to sufficient doubt to deserve consideration by this Court. The course of decisions has been uniform; as shown by the foregoing excerpts from the *Niagara Falls* decision, the Circuit Court of Appeals for the Second Circuit is in accord with the Commission and the court below; and the same view is implicit in the decision of the Court of Appeals for the District of Columbia in *Pennsylvania Water & Power Co.* v. *Federal Power Commission,* 123 F. 2d 155, 156, note 2, 163, certiorari denied, 315 U. S. 806. The holding of this Court in *United States* v. *Bellingham Bay Boom Co.,* 176 U. S. 211, that the term "affirmatively authorized by law" in the Rivers and Harbors Act of 1890 (Act of Sept. 19, 1890, c. 907, § 10, 26 Stat. 454) meant "authorized by a state law," was predicated on the fact that prior to 1890 no federal legislation had been enacted in the field, so that only state laws could have been meant. No such rationale can support a similar construction of language adopted in 1935, after 45 years of federal legislation in the field. In 1935 not only had there been prior federal legislation of a general nature under which the Chief of Engineers and the Secretaries of War, Interior and Agriculture had

issued numerous permits and approvals,[8] but there had also been some eighty acts of Congress authorizing particular water power projects. House Hearings, Committee on Water Power, 65th Cong., 2d Sess., pp. 503–507.[9] These, we believe, are the projects—and the only projects—intended to be saved by the exception.

In any event, we do not believe that on the facts of this case the question which the petitioner Corporation seeks to raise is properly before the Court. The Corporation would rest on the original franchise, granted in 1887 and acquired by it

---

[8] Mar. 3, 1899, c. 425, §§ 9 and 10, 30 Stat. 1151, 33 U. S. C. 401, 403; Feb. 15, 1901, c. 372, 31 Stat. 790, 16 U. S. C. 79, 43 U. S. C. 959; Jan. 21, 1895, c. 37, § 2, 28 Stat. 635; May 14, 1896, c. 179, 29 Stat. 120, 43 U. S. C. 957.

[9] It may be remarked that the legislative history cited by the petitioner Corporation (Pet. 15–16) related to the Federal Water Power Act as adopted in 1920, when Section 23 contained no equivalent of the provision, now the first sentence of Section 23 (b), requiring licensing for the maintenance of dams in navigable streams.

The cases cited by the Corporation (Pet. 13–14) as upholding the validity of state authorizations for structures in or over navigable waters, issued prior to congressional occupancy of the field, do not affect the undoubted proposition that when Congress does undertake to exercise its power under the commerce clause it is not restricted by its own past inaction. *Union Bridge Co.* v. *United States*, 204 U. S. 364, 400. As Chief Justice Groner said for the Court of Appeals for the District of Columbia, construing the provisions of Sections 4 (g) and 23 (b) which were added in 1935: "It cannot be considered, we think, that Congress meant to allow existing obstructions to continue unregulated in the navigable streams of the United States." *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, *supra*, at p. 163.

in 1936. This legislative franchise was by its terms subject to amendment or repeal, and in 1915 Wisconsin by law provided that a new permit should be required for the substantial alteration of dams theretofore constructed.[10] The Corporation in 1937 sought and acquired such a new permit for the "reconstruction" of the Tomahawk dam which gave rise to this litigation. It is this permit, granted many years after June 10, 1920, upon which the Corporation's state authority for the reconstruction must rest. That the state so construes its law follows from the fact that the permit was issued in 1937 after hearing and findings as required by the 1915 act; and it follows inferentially from the fact that the petition of the State of Wisconsin assigns no error in the holding that the Corporation was not within the exception. For this reason we believe that the Corporation is without standing to raise the issue which it seeks to present.

2. Both petitioners contend that the evidence in the record fails to support the Commission's finding that the Wisconsin River at Tomahawk is "navigable" as that term is used in Section 23 (b) of the Act. In part this contention is predicated on an assertion that in defining the term "navigable waters" in Section 3 (8) Congress intended

[10] See note 5, *supra*. That this law amended the original franchise, see *Allaby* v. *Mauston Elec. Serv. Co.*, 135 Wis. 345 (1908); *State* v. *Beloit City School Dist.*, 215 Wis. 409 (1934).

to import into the Act a concept of navigability narrower, in some not too clearly indicated degree, than the broad concept hitherto accepted by this Court in defining the range of federal power over the "navigable waters of the United States." The State of Wisconsin further urges (Pet. 7–9) that the record fails to support a finding of navigability even in the broadest constitutional sense. Both arguments, we believe, are untenable.

As we understand the first of these two arguments, it is that although Congress might properly have required a license for the construction of a dam on such a river as the Wisconsin is shown to be at Tomahawk, on a mere finding of its "navigability" in the constitutional sense, it did not do so. This, petitioners urge, must follow from the fact that the first and second sentences of Section 23 (b) contemplate different situations in which licenses will be required. If "navigable waters of the United States," in the first sentence, is to be construed as comprehending all waters within the meaning of that term as construed in previous decisions of the courts, then, they argue, the second sentence, relating to waters within the commerce power but not "navigable" as defined in the Act, would be meaningless.[11] To give it meaning, the petitioners would limit the

[11] The power over navigation, of course, derives from the commerce power. See *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 404.

term "navigable waters" as used in the Act to rivers currently used, or usable without improvement, as up-to-date interstate water highways.[12] Rivers constitutionally "navigable" but not so used or usable would then fall under the second sentence of the section, requiring permits only on a valid finding of the effect of the particular project on the interests of interstate commerce. As support for this view, petitioners would point to the phrase "used or suitable for use" in the definition in the Act (Section 3 (8)), and would mark the difference between that phrase and the phrase "susceptible of being used" contained in the standard judicial definition of constitutional "navigability" (*The Daniel Ball,* 10 Wall. 557, 563). They would also in some way draw comfort from the fact that Section 3 (8) purports to define "navigable waters" rather than "navigable waters of the United States."[13]

We submit that petitioners' argument is unsupported by authority, and is disposed of by this Court's opinion in *United States* v. *Appa-*

[12] This is what we understand the petitioners to propose as the proper meaning for the phrase "used or suitable for use" in Section 3 (8), the definition section. To show unsuitability in this sense, the petitioner Corporation refers (Pet. 21–22) to loss of life in the river traffic and some wastage of the lumber transported.

[13] See the petition of the Corporation, pp. 19–21. The significance of this fact is obscure, especially in view of the fact that Section 23 (b) requires the licensing of dams on "any of the navigable waters of the United States."

lachian Power Co., 311 U. S. 377. There this Court applied the concept of navigability to a river, if anything, less "suitable" for navigation than the Wisconsin River at Tomahawk. Apart from the factual comparability of the rivers, the opinion makes clear that the term "navigable waters" in the Act is to be given a construction quite as broad as, if not broader than,[14] that previously accorded by the Court to the term for constitutional purposes. Not only does the *Appalachian* opinion (pp. 404–409) discuss the coverage of the Act in terms of the "basic concept of navigability" expressed in the "generally accepted definition of *The Daniel Ball*" (p. 406); it uses the words "susceptibility" and "suitability" interchangeably. The use, and improvements for use, in interstate commerce which were relied upon to establish navigability had all ceased many years before (311 U. S. at 415, 418). Improvements would be necessary to make possible even the most limited use by two-foot draft keelboats (p. 417), and the cost of improvements to make possible navigation by even small steamboats would have been "prohibitive" (p. 418). Plainly, the river was not "suitable" for navigation, as petitioners would use the term; but by

[14] Cf. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F. 2d 155, 158 (App. D. C.), certiorari denied, 315 U. S. 806.

virtue of its former use for navigation [15] and its susceptibility to improvement it was nevertheless a "navigable water" for purposes of the Federal Power Act.

The petitioners' basic argument of construction accordingly falls before the decision in the *Appalachian* case. The view which the Court there took, and which we advance here, does not render the second sentence of Section 23 (b) meaningless; scope for its application can be found in waters which are obviously nonnavigable, but the flow of which nevertheless affects interests within the commerce power. Cf. *United States* v. *Appalachian Power Co.*, 311 U. S. at 399. The existence of such waters has been recognized by this Court since the *Appalachian* case. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 523; cf. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690.

We regard it as established, therefore, that navigability under the Act is coextensive with navigability as heretofore defined by the courts, and that the petitioners' challenge to this proposition is too unsubstantial to warrant consideration by this Court. The same may be said of the supplemental contention of the State of Wisconsin that even conceding our view of the law the Wisconsin

[15] As the Court pointed out (p. 408): "When once found to be navigable, a waterway remains so" (citing *Economy Light Co.* v. *United States*, 256 U. S. 113).

River at Tomahawk could not properly be held to be navigable. For convenience we set out in a footnote the evidence summarized by the court below as supporting the Commission's order.[16]

---

[16] "The Wisconsin River has its source in Lac Vieux Desert, which lies partly in the State of Michigan and partly in the State of Wisconsin. It is 428 miles in length. It drops from an elevation of 1,652 feet at its source to 604 feet at its mouth, with an average fall of 2.45 feet per mile. It flows generally south to the city of Portage, Wisconsin, and then west for about 116 miles to its junction with the Mississippi River near Prairie du Chien.

* * * * *

"* * * there is evidence in the record that from 1835 to 1897 some three billion board feet of white pine was taken out of the State of Wisconsin down the Wisconsin River 'to market' on the Mississippi River from Dubuque, Iowa, to St. Louis, Missouri. This use of the river continued at a diminishing rate until 1915. During the period between 1858 and 1907 a large part of this lumber was logged above Tomahawk and taken down the river past the Corporation's dam. As far down as Merrill, some 28 miles below Tomahawk, the lumber was transported in loose logs driven downstream. The logs were cut into lumber at the mills at Merrill and other points on the river, and thence rafted down the Wisconsin and Mississippi Rivers to market in other States. The rafting from Merrill commenced about 1849, and until after the advent of the railroads, it was the only means of reaching a market.

"The log driving season began with the spring freshet in April and aggregated in the neighborhood of 150,000,000 board feet. If a drive was hung up for lack of water, the crew would wait for another freshet to finish the drive, the 'June freshets' being, in the language of one witness, 'as regular as the sun rises and sets,' and there were some drives in the Fall. The drives ended from 28 to 114 miles below Tomahawk. These freshets assured two rafting trips each year. The rafts were usually run to a fixed

This evidence is certainly no less persuasive than the evidence as to the New River in the *Appalachian* case, and as to the Susquehanna River in *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F. 2d 155, 158–161 (App. D. C.), certiorari denied, 315 U. S. 806. Moreover, the *Appalachian* case arose by way of suit for injunction, and the United States explicitly waived in this Court the contention that the Commission's earlier finding as to navigability was entitled to the finality ordinarily accorded to a quasi-judicial determination by an administrative agency (see 311 U. S. at 402, note 7). The Court was free to make its own evaluation of the evidence, except insofar as it might have felt itself inhibited by the two-court rule (311 U. S. at 403–404). Here, the Commission's finding is directly in issue in a review proceeding under Sec-

---

destination such as St. Louis, Missouri, Dubuque, Iowa, or Alton or Galena, Illinois.

"As early as 1857 there were 3,000 men engaged in the lumbering industry and the log stock exceeded $4,000,000 yearly in value. Timber owners engaged in the industry sold their logs before the drive started or when the logs reached the mills. The log driving crews were usually paid off when the logs were sold at the mill, but occasionally the same crew ran the rafts down to market where they were paid off. The sawmills obtained their funds for the purchase of the logs and the payment of operating expenses through advances obtained from the river dealer, payable when the rafts came down. Thus, the industry depended, for the funds its operations required, upon the transportation of the lumber to market on the Mississippi River and its sale there." (R. 645, 647–648.)

tion 313 (b) of the Act, and if supported by substantial evidence is conclusive upon the courts. *Jersey Central Power & Light Co.* v. *Federal Power Commission,* 319 U. S. 61, 67. The court below has held that substantial evidence in the record does support the order, and there is no occasion for further review of that holding by this Court.[17] See *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 130–131.

---

[17] The State contends (Pet. 7) that the holding of the court below is in conflict with five cases, naming those which were briefly distinguished in the paragraph of that court's opinion beginning at R. 648 and concluding at R. 649. Reference to the facts of those cases, as cited by the court, will show that in each the contention that the waterway involved was a navigable water was supported merely by a showing of exceptional, occasional, sporadic, or trifling use for transportation, without commercial significance, as contrasted with the "long, regular and commercially successful use of the stream for the transportation of logs and rafts," which the lower court found established by the evidence in this case (R. 652). No attempt is made by the State to controvert the lower court's distinction of those cases.

CONCLUSION

The decision below is correct. There exist no conflicts. We respectfully submit, therefore, that the petitions for writs of certiorari should be denied.

HUGH B. COX,
Acting Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
CHESTER T. LANE,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
Attorney.

CHARLES V. SHANNON,
General Counsel.
HOWARD E. WAHRENBROCK,
Assistant General Counsel,
Federal Power Commission.

JUNE 1945.

APPENDIX

The pertinent provisions of the Federal Power Act are as follows:

> SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:
>
> * * * * *
>
> (8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.
>
> * * * * *
>
> SEC. 4. The Commission is hereby authorized and empowered—
>
> * * * * *
>
> (e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any

State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or

waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * * *

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, state, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

* * * * *

SEC. 23. (a) The provisions of this Part shall not be construed as affecting any

permit or valid existing right-of-way heretofore granted or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license hereunder, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this Part and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: *Provided,* That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this Part and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing.

(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the

terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

* * * * *

SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the

ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the

application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

Section 31.18 of the Wisconsin Statutes, 1937 (the then current codification, with immaterial changes, of Chapter 380, Laws of Wisconsin, 1915), provides in part as follows:

> (1) The grantee of any permit, the owner of any dam constructed before permits were required by law, and the owner of any bridge at the city of Portage or at any point above that city, over the Wisconsin river, shall maintain and operate all such dams, slides, chutes, piers, booms, guide booms, weirs, tunnels, races, flumes, sluices, pits, fishways, locks, boat hoists, marine railways and all other equipment required by the [public service] commission for the protection of public rights in such waters, and for the preservation of life, health and property, in good repair and condition, and shall not wilfully, or otherwise, injure, remove or destroy the same, or any part thereof, unless the commission shall have approved such removal or destruction in writing.
>
> * * * * *
>
> (3) Except when emergency shall require the same for the protection of life, health or property, no substantial alteration or addition shall be made to any dam heretofore or hereafter constructed without obtaining an order therefor from the commission, which order may be issued only after an investigation and upon a finding that the proposed alterations or additions will not impair the sufficiency of such dam or any existing public rights in such waters.

U. S. GOVERNMENT PRINTING OFFICE: 1945